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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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July 28, 1973

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above entitled proceeding. NAB has received permission to file such a brief from both the Solicitor General of the United States and the Federal Communications Commission although Petitioner, National Cable Television Association, Inc., has refused consent to this filing.

NAB is a non-profit organization of radio and television broadcasters whose membership as of July 18, 1973, includes 1,378 FM stations, 2,269 AM stations and 534 television stations. The objective of the NAB, in accordance with its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

The commercial broadcast services are subject to the Federal Communications Commission (hereinafter Commission or FCC) rules relating to fees, 47 CFR §§ 1.1101-1120,[1] 23 F.C.C.2d 880 (1970),[2] as modified in 28 F.C.C.2d 139 (1971),[3] presently before this Court for review.

NAB respectfully submits that the challenge to the schedule of fees as presented by the National Cable Association, Inc., Petitioner, will not adequately reflect the positions of the NAB respecting the fundamental legal authority upon

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[1] For text, *see* Petitioner's Brief for Certiorari at app. B, 21-9, Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313 (5th Cir. 1972), *cert. granted sub nom.* National Cable Television Ass'n v. United States, ___ U.S. ___, 36 L Ed.2d 957, 93 S. Ct.___ 1973.

[2] For text, *see Id.* at app. B, 1-21.

[3] For text, *see Id.* at app. B, 33-59.

which the Commission's annual fees affecting commercial broadcasters are premised. Whereas it is anticipated that Petitioner will concern itself only with fees assessed against the CATV industry, NAB requests this opportunity to be heard in opposition to the substantial annual fees imposed upon the commercial broadcast industry.

In keeping with its above stated objectives, the NAB herein seeks to protect its members from the unjust imposition upon all commercial broadcasters of an unreasonable and arbitrary annual assessment for the privilege of participating in the broadcasting industry. NAB is not opposed to the basic objective of collecting fair and equitable fees. It is our belief, however, that the scope, form and asserted legal basis for the annual fees imposed by the Commission are without merit. In particular, we shall show that the FCC has taken great liberties with the powers delegated to it by the Congress and has wrongfully disregarded the standards and guidelines set forth in the statute and associated directive upon which the contested fees were predicated: Title V of the Independent Offices Appropriations Act[4] and Bureau of the Budget Circular No. A-25.[5] In authorizing federal agencies to render themselves "self-sustaining to the full extent possible" the enabling statute and directive intentionally limit the imposition of "reasonable" charges to "each identifiable recipient for a measurable unit or

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[4] 31 U.S.C. § 483(a) (1971). For pertinent portion, *see* Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313, 1315-16 n. 2 (5th Cir. 1972), *cert. granted sub nom.* National Cable Television Ass'n v. United States, ___ U.S. ___. 36 L Ed.2d 957, 93 S. Ct. ___ (1973).

[5] For text, *see* Petitioner's Brief for Certiorari, *supra* at app. C.

amount of Government service or property from which he derives a special benefit." In adopting annual fees for commercial broadcasters, NAB submits that the FCC exceeded those parameters by devising fees predominantly directed toward enabling the Commission to recover the full amount of its annual Congressional appropriation. Any decision by this Court in this proceeding will, of necessity, affect significantly the interests of the NAB and commercial broadcasters to the extent that such a decision determines the validity of the Commission's action in imposing the contested annual fees.

WHEREFORE, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above entitled proceeding.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF AMICUS

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of the Petitioner herein. The interest of amicus NAB has been stated in full in the accompanying *Motion for Leave to File Brief Amicus Curiae.*

PRELIMINARY STATEMENT

On February 19, 1970, the Federal Communications Commission (hereinafter Commission or FCC) issued a *Notice of Proposed Rule Making*[1] which set forth a new schedule of fees designed to recover the full amount of the Commission's annual Congressional appropriation. The Commission had previously maintained a schedule of fees, first adopted in 1963,[2] which provided for the assessment of nominal filing fees, approximating 25 percent of its annual appropriation. The validity of those nominal fees was established in *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965).

The new schedule proposed in 1970 was designed to apply to all of the communications services regulated by the Commission.[3] Following a period for submission of Comments and Reply Comments, the Commission, on July 2, 1970, released its *Report and Order*,[4] adopting

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[1] 21 F.C.C.2d 502 (1970).

[2] *Report and Order* in Docket No. 14507, 34 F.C.C. 811 (1963).

[3] For the 1971 fiscal year the FCC calculated that 38.8% or $9,661,200 of its total budget of $24,900,000 was to be collected from the broadcast services. *Supplemental Notice*, 23 F.C.C.2d 183 (1970).

[4] 23 F.C.C.2d 880 (1970), *modified*, 28 F.C.C.2d 139 (1971). The schedule of fees, Rules and Regulations of the Federal Communications Commission, 47 C.F.R. §§1.1101-1120, is reproduced in full in Petitioner's Brief for Certiorari at app. B, Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313 (1972), *cert. granted sub nom.* National Cable Television Ass'n. v. United States, ___ U.S. ___, 36 L Ed.2d 957, 93 S Ct. ___(1973).

the fee schedule under consideration in this case. Existing filing fees for commercial broadcasters were substantially raised and new fees were initiated. Principal among the latter, was the establishment of an annual fee amounting to "24 times a radio station's highest one-minute spot announcement rate, but not less than $52, and 12 times a television station's highest 30-second spot announcement rate, but not less than $144."[5] These annual fees are singled out in this brief because they are most clearly violative of the criteria governing the imposition of fees by Federal agencies.

In response to the July *Report and Order* a number of Petitions for Reconsideration were filed before the Commission. The FCC replied with its *Memorandum Opinion and Order* of August 1, 1971,[6] which essentially retained the fees directed against broadcast services as contemplated in the July 2nd order.

The impact of the new fees was not inconsiderable and there ensued a number of individual challenges to the Commission's authority in adopting the new schedule of fees. Those proceedings were consolidated in the United States Court of Appeals for the Fifth Circuit. That court rendered its decision in *Clay Broadcasting Corp. of Texas v. United States*, 464 F.2d 1313 (5th Cir. 1972), sustaining the validity of the fee schedule in all respects. Thus that court held that the Commission had not exceeded or abused its

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[5] Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313, 1317 (1972), *cert. granted sub nom.* National Cable Television Ass'n. v. United States, ___ U.S. ___, 36 L.Ed.2d 957, 93 S. Ct. ___(1973).

[6] 28 F.C.C.2d 139 (1971).

statutory authority to devise charges or fees so as to enable the agency to become "self-sustaining to the full extent possible" pursuant to Title V of the Independent Offices Appropriations Act of 1952 (hereinafter Title V).[7] The Fifth Circuit thus did not find the fees violative of the standards for implementing Title V set forth in Bureau of the Budget (now Office of Management and Budget) Circular No. A-25[8] limiting federal agencies to the imposition of "reasonable" charges to "each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."

NAB submits that in adopting the new fee schedule fashioned to enable the Commission to recover the full amount of its annual Congressional appropriation, the FCC did, in fact, exceed the restrictive parameters of Title V and the Budget Circular. Thus, NAB respectfully urges this Court to reverse the decision of the Fifth Circuit and invalidate the Commission's annual assessment against commercial broadcasters as a wrongful attempt to recoup the costs of Commission activities which are of benefit to the public generally and do not constitute special services inuring to the benefit of identifiable recipients.

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[7] 31 U.S.C. §483(a) (1971). For pertinent language, *see* 464 F.2d at 1315-16 n.2.

[8] For text, *see* Petitioner's Brief for Certiorari, *supra* at app. C.

ARGUMENT

I. THE LOWER COURTS ARE IN CONFLICT AS TO THE PROPER INTERPRETATION OF TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT.

Shortly after the *Clay* decision, *supra*, the United States Court of Appeals for the District of Columbia Circuit handed down its decision in the case of *New England Power Co. v. Federal Power Commission*, Cases No. 71-1439, 71-1539, 71-1555.[9] The *New England Power Co.* case, like the FCC case, concerned the validity of certain annual fees assessed against participants of the regulated industry. In both cases the contested fee schedules were premised upon the same statutory directives and executive guidelines. Contrary to the ruling of the Fifth Circuit, however, the United States Court of Appeals for the District of Columbia Curcuit held that the Federal Power Commission (hereinafter FPC) was in violation of the enabling legislation and executive guidelines in imposing its annual charges. Amicus NAB believes that the reasoning applied by the court in the *New England Power Co.* case reinforces the alleged impropriety of the Fifth Circuit decision.

Both cases concerned the adoption of annual fees or charges pursuant to the authority granted to Federal agencies under Title V to recoup certain of their operating costs. Title V provides, in part:

> It is the sense of the Congress that any work, service, . . . benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted, . . .

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[9] 467 F.2d 425 (D.C. Cir. 1972).

> by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible . . .[10]

Accordingly, Federal agencies are permitted to prescribe "fair and equitable" fees or charges against participants in their respective regulated industries. In setting the fees, however, the agency is directed to "consider direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . . "

In their review of these factors the two courts of appeals differed sharply in construing the concept "value to the recipient;" their final decisions largely turn on the breadth or narrowness attributed to that term. In particular, the District of Columbia Circuit adopted a strict or narrow interpretation of the "value to the recipient" concept restricting the recoupment of costs to identifiable special beneficiaries of governmental activities. In contrast, the Fifth Circuit appraised the adoption of the new FCC schedule of fees as a "reasonable exercise of the authority delegated to the Commission by Congress" to become more nearly self-sustaining:

> In addition to levying application fees, the Commission proposed to give explicit recognition to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license. [Footnote omitted.] 464 F.2d 1313, 1316 (5th Cir. 1972).

The standards and guidelines for applying Title V were set forth by the Bureau of the Budget's Circular No. A-25.

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[10] *See* note 7 *supra.*

According to the Circular, as it was described by the District of Columbia Circuit, reasonable charges

> . . . *"should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."* These services include agency action which "provides special benefits . . . *above and beyond those which accrue to the public at large* . . . ." [Emphasis added]. 467 F.2d at 428.

Thus, the Circular specifies that charges imposed by an agency should be reasonable and they should be made only to identifiable recipients of measurable amounts of Government service from which the recipient derives a special benefit. Furthermore, the Circular stipulates that in no case should a charge be imposed where the "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." The foregoing language of the Circular is seemingly clear, yet the two courts of appeals, as was the case with defining the term "value to the recipient," reached conflicting conclusions as to the proper utilization of the Circular in reviewing fees predicated upon Title V.

In 1971 the FPC had imposed upon natural gas companies and electric utilities a new schedule of fees, including an annual charge designed to reimburse the FPC for costs of administering certain of its regulatory programs not met by filing fee revenues. The annual charge was described by the FPC as having been

> . . . predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal

> level and the exercise of the powers delegated to them by the Congress . . . . 45 F.P.C. 964, 967 (1971).

A review of the language and legislative history of Title V resulted in the District of Columbia Circuit's finding that such an annual fee was beyond the scope of the agency's fee setting authority:

> As the foregoing legislative history makes clear, Title V was enacted to allow the agency to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public. The statute has been consistently interpreted in this manner by the agencies of the executive branch of Government. [Footnote omitted]. 467 F.2d at 428.

Similarly, the court disallowed the annual fee scheme as violative of the Bureau of the Budget Circular which forbade the levying of charges for services where the "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." Quoted in 467 F.2d at 428. The Circuit Court was not persuaded, moreover, by the FPC's assertions that the fees were appropriate compensation for the beneficial economic climate fostered by the Commission's regulatory activities which inured to the benefit of all participants in the industry. To the contrary, the court noted that

> *The creation of an "economic climate" is not a special service nor is a particular pipeline or gas company the "special beneficiary" of such a climate any more*

> *than any other pipeline, gas company or the consumer in general.*
>
> * * *
>
> *In sum, we conclude that the regulation of these industries is primarily for the benefit of the public.* Their charter statutes require them to so act. The courts have so held. (Footnote omitted). There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. [Emphasis added]. *Id.* at 429.

By contrast, the Fifth Circuit affirmed the FCC's annual assessment, despite the similarly remote relationship between services rendered by the Commission and the fees imposed against commercial broadcasters.

In categorical exception to the ruling of the District of Columbia Circuit, the Fifth Circuit adopted an "economic climate" argument as a justifiable basis for imposition of annual fees:

> In exchange [for fees], commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent

> with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. 464 F.2d at 1318.

Thus the Fifth Circuit was unable to find that the Commission had acted unreasonably or arbitrarily in imposing fees designed to fully recover direct and indirect costs of regulating the communications industry.[11]

In sum, the United States Court of Appeals for the District of Columbia found fault with the FPC's attempts to recoup their costs of regulating public utilities via annual charges where such regulation is primarily for the benefit of the public. The Fifth Circuit reached the opposite conclusion; it utilized a more expansive view towards the criterion "value to the recipient."

II. THE FIFTH CIRCUIT ERRED IN AFFIRMING THE FCC FEE SCHEDULE; THE DECISION IS FOUNDED UPON A MISAPPREHENSION OF APPLICABLE LAW

As discussed in the foregoing, the decisions of the two courts of appeals are in apparent conflict regarding the appropriate interpretations and applications of the legislative and executive guidelines authorizing agencies to recoup their Congressional budgets to the fullest extent possible. Amicus NAB respectfully submits that the holding of the District of Columbia Circuit in *New England Power Co.* reflects the more appropriate application of Title V and the associated Budget Circular; appropriate in terms of legislative history and reasonableness.

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[11] 464 F.2d at 1318.

A. The FCC fee schedule goes beyond an appropriate *quid pro quo* exchange of services and benefits between an agency and the industry it regulates.

NAB contends that in devising its new schedule of fees the FCC failed to lend credence to the specific language of the enabling statutes and, as a result, improperly concerned itself with achieving full recovery of the FCC's annual Congressional appropriation. The fee schedule adopted by the Commission, moreover, was apparently premised upon a basic fallacy that regulatory activities are primarily for the benefit of the regulated. Accordingly, for example, the FCC determined that broadcasters should reimburse the Commission the full cost of all activities related to the broadcasting industry. NAB submits that this misapprehension as to the intent and purpose of Title V stems from the Commission's loose interpretation of the "value to the recipient" concept.

NAB contends that the FCC was obligated to base its fee schedule squarely upon Title V and the Bureau of the Budget Circular. Accordingly, an agency is permitted to adopt "fair and equitable" fees which take into account the cost to the Government, the value to the recipient, and the public policy or interest served. Furthermore, such fees must be reasonable and assessed against only identifiable recipients of measurable amounts of government service from which the recipient receives a special benefit. Most importantly, the Budget Circular stipulates that no charges should issue where the "ultimate beneficiary is obscure and the service can primarily be considered as benefitting the public as a whole." As indicated earlier, the Fifth Circuit rejected these arguments as construing in too limited a fashion the guidelines provided by the enabling statute and affirmed the FCC fees:

> . . . the Commission proposed to give explicit recognition to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license. [Footnote omitted]. 464 F.2d at 1316.

In other words, the Commission has focused almost exclusively upon the "value to the recipient" criterion. Assuming, *arguendo*, that it is appropriate for the Commission to focus upon only one of the three explicit statutory criteria and virtually disregard the others, NAB contends the FCC has wholly misconstrued the notion of "value to the recipient."

As evidenced in the *New England Power Co.* case, the legislative history of Title V demonstrates a concern that agencies be permitted "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public." 467 F.2d at 428. That court went on to reject the FPC's arguments that the creation of an "economic climate" was a special service which inured to the benefit of the individual regulated industries. *Id.* at 429.

Similarly, NAB suggests the Fifth Circuit erred in adopting the FCC's "economic climate" argument:

> In exchange, commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation . . . maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. 464 F.2d at 1318.

In support of its position NAB submits that the Communications Act of 1934, as amended, makes patently clear that the primary function of the FCC in granting broadcast licenses is not to benefit the licensee, but to insure that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. §§ 307(a), 309(a). Thus, although the broadcast license enables the licensee to engage in a business which may be economically profitable, in the final analysis it is the public which is the prime and ultimate beneficiary of the broadcasting service.[12]

It is, moreover, the right of the public to be informed that governs the use of broadcast frequencies; so said this

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[12] Former FCC Chairman Hyde made this same point during the following testimony:

> Mr. Hyde: I was going to suggest that we are communications people rather than revenue people.
>
> Mr. Talcott: You are providing them an enormous service, more than $24 million. By protecting the broadcasting industry from CATV, you are certainly rendering a great service.
>
> Mr. Hyde: I would respectfully argue that we are not protecting one industry from another, we are trying to maintain a healthy competitive relationship.
>
> Mr. Talcott: That must be of some value.
>
> Mr. Hyde: It is of value but we don't do it for the benefit of particular industries. *We do it for the overall benefit of the public. Any benefits that accrue to particular applicants are incidental to that.* [Emphasis added].

Hearings before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 1st Sess., pt. 1, at 583 (1969).

Court in *Red Lion Broadcasting Co. v. FCC*[13] and even more recently in *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[14] Surely if the rights of the public govern the use of the electromagnetic spectrum they are the true beneficiaries of the Commission's regulatory activities, not the individual broadcasters. Indeed, this Court described the function of licensees upon using "scarce radio frequencies as *proxies for the entire community* obligated to give suitable time and attention to matters of great public concern."[15] (Emphasis added).

Statements such as these leave little doubt that the regulation of broadcasting undertaken by the Commission is not designed primarily for the benefit of the licensee, but for that of the public. If the public is the ultimate beneficiary of Commission efforts, it follows that many of the activities for which the Commission is assessing fees against licensees cannot be charged. For example, under the "value to the recipient" theory proffered by the FCC, the fees charged commercial broadcasters would encompass FCC budgetary provisions related to management of the Emergency Broadcast System, noncommercial educational broadcast services, and such other assorted activities as research, participation in international conferences, business trips undertaken by FCC Commissioners and staff members, the handling of public correspondence, the processing of rule-making petitions filed by members of the general public and a host of others. NAB strongly suggests that the undertaking of these types of activities inure

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[13] 395 U.S. 367, 390 (1969).

[14] ___ U.S. ___, 36 L. Ed.2d 772, 783, 798-99, 93 S Ct. – (1973).

[15] Red Lion Broadcasting, 395 U.S. at 394.

to the direct benefit of the public and not to commercial broadcasters. By adopting a fee schedule which requires commercial broadcasters to assume the costs of these public services, the Commission has clearly exceeded its authority.

The Commission attempted to justify the new fee schedule by asserting that since the Commission has the authority to adopt fees of some kind, any fees it adopts are permissible and lawful. On its behalf the Commission relied upon the decision in *Aeronautical Radio, Inc. v. United States*[16] as dispositive of questions concerning its authority to assess fees. NAB respectfully submits, however, that the *Aeronautical Radio* case, *supra*, is inapposite to the nature of the fees here imposed by the FCC. In particular, that case upheld the validity of nominal filing fees upon certain types of radio license applications. However, the present case deals with a schedule of substantial fees which cannot be described as nominal and which provides for annual fees unrelated to the receipt of special benefits by the licensee. In other words, *Aeronautical Radio* is inapposite because the present fees are not nominal and the annual fees in particular are not attributable *quid pro quo* to Commission activities designed to confer specific benefits upon the individual payee; at least so held the court in *New England Power Co.*[17]

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[16] 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). *See also* Preliminary Statement, *supra* at note 2.

[17] 467 F.2d at 428, n. 9.

B. The FCC fee schedule is arbitrary and unreasonable.

In adopting the new fee schedules the FCC demonstrated a glaring disregard for the proscriptions of Title V and the Budget Circular. Apparently committed to its goal of recovering its full appropriation, the Commission has merely arbitrarily divided up its total operating budget among the commercial communications services it regulates. Individual service fees were then set at levels to assure that each of the commercial services would pay total yearly fees commensurate with its allocated share of the FCC's budget.

The standards and guidelines for setting fees were specified in Title V and the Budget Circular. Conceivably, as the Commission contends, the agency has the discretion to determine what weight should be placed on each of the factors or criteria involved. But surely a fee can only be valid if the agency has, in fact, considered all of the necessary criteria of the enabling directives. It is clear that the FCC considered the "value to the recipient" factor and it alleged to have weighed the other factors as well:

> Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. 21 F.C.C.2d 502, 503-04 (1970).

There is no evidence, however, that the fees imposed are in return for a "measurable amount of Government service" from which an identifiable recipient obtains a special benefit. Although the Fifth Circuit held that the

Commission need not pro-rate its costs precisely, that court failed to respond to the problem that in fact other interests are being served by the Commission and yet the fee schedule does not reflect those costs separately. Thus, the annual fees assessed against commercial broadcasters were arbitrarily set to recover the costs of regulating noncommercial broadcasting, research activities, speech making, correspondence activities with the public, and so forth.

Similarly, the annual fee bears no relationship to the *quid pro quo* exchange of services and benefits with the Commission. Accordingly, it cannot be said that the annual fee reflects the time and effort expended by the Commission on behalf of the individual "recipient." It is significant that all applications for construction permits, licenses, and assignments or transfers of licenses are accompanied by particular filing fees apart from the annual fee. In essence the annual fee is a charge imposed simply for the privilege of being a licensee; it bears no relationship to any measurable amount of Commission work performed for the particular licensee.

CONCLUSION

Amicus NAB does not question the Commission's authority to assess fees against members of the industry it regulates in an effort to recoup certain of its operating costs. We concede that the Commission engages in certain activities of direct benefit to broadcast licensees and, accordingly, broadcast licensees should pay fair and equitable fees for those services. We do submit, however, that the annual fee, as assessed by the Commission, is totally disparate with the legislative directives governing the adoption of fees by independent agencies.

We respectfully submit that the decision in *New England Power Co.* accurately demonstrates that where the beneficiaries of a particular regulatory program are obscure and the agency service can primarily be considered to benefit broadly the general public, there can be no basis for an agency fee such as the annual broadcast license fee. We urge this Court to rule that in light of the executive directive that independent agencies can only impose fees where there is an identifiable recipient who has received a measurable amount of Government service from which he has obtained a special benefit, the Commission's annual fees are invalid for lack of a measurable amount of service rendered to the particular licensee against whom the charge is imposed.

WHEREFORE, for the reasons stated, NAB respectfully requests this Court to correct and reverse the errors of the Fifth Circuit and the misapprehensions of the law practiced by the Federal Communications Commission and invalidate the annual fees charged commercial broadcast licensees.

Respectfully submitted,

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